SUPREME COURT, U. S.

74-639

Supreme Court, U. S.

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Supreme Court of the United States

October Term, 1974.

THE STATE OF CONNECTICUT and ROSE SANTINI, as Administratrix of the Estate of ALDO SANTINI, Deceased,

Petitioners,

against

HOWARD KLARMAN, THE TOWN OF WESTPORT and FRED KELLOGG, JR.,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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THE STATE OF CONNECTICUT and ROSE SANTINI, as Administratrix of the Estate of Aldo Santini, Deceased,

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HOWARD KLARMAN, THE TOWN OF WESTPORT and FRED KELLOGG, Jr.,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

Petitioners pray for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered on September 3, 1974.

Opinions of the Courts Below.

The opinion of the United States District Court for the District of Connecticut is reported at 1973 A.M.C. 1981 and is not officially reported. It is annexed hereto as "Appendix B" (pp. 26-39).

The opinion of The Court of Appeals for the Second Circuit has not yet been reported (..... Fed. 2d .....). It is annexed hereto as "Appendix A" (pp. 9-25).

Jurisdiction.

The judgment of the Court of Appeals was entered on September 3, 1974. The jurisdiction of this Court is invoked under Title 28 U.S.C. §1254(1).

Questions Presented.

1. Is an Auxiliary Police Officer assigned to active duty aboard a Police Launch, under the command of a regular Police Officer of the Town of Westport, operating in inland navigable waters of the United States, a member of the crew of the launch within the meaning of the Merchant Marine Act of June 5, 1920 (Jones Act, 46 U.S.C. 688)?

2. Does the fact that the Auxiliary Police Officer was acting without pay, as a volunteer, deprive him of the rights of other members of the crew?

3. Where the evidence showed that the Auxiliary Police Officer received and made fast to the towing bitt of the Police Launch, lines from a grounded sloop in an effort to salvage the sloop, was such Police Officer doing the work of a seaman within the meaning of *Seas Shipping Co. vs. Sieracki,* 328 U. S. 85?

Statement.

This litigation arises out of the following facts:

On June 26, 1964, one Aldo Santini (hereafter Santini) was acting as an Auxiliary Police Officer for the Town of Westport in the State of Connecticut (hereafter Wesport). Santini received no compensation. He was assigned to work aboard a Police Launch, the "Marine I," which was commanded by a regular paid Police Officer of the Town, one Fred Kellogg, Jr. (hereafter Kellogg).

Santini was receiving "on the job training" and was actively assisting in the patrol being carried on by the launch. The Marine I was hailed by one Howard Klarman

(hereafter Klarman), owner of the Fling, a 28-foot sloop equipped with sails and auxiliary motor which had gone aground in Westport Harbor when it strayed out of the channel marked by buoys. Klarman selected a rope which he kept aboard the Fling and personally affixed it to the Fling. The line was then thrown to the Marine I where Santini, either alone or under the direction of Kellogg, received and made it fast to the towing bitt of the Marine I.

Several attempts to draw the sloop from the shoal were made from various angles. On each occasion, Klarman selected the point on the Fling to which the line was to be attached. Attempts were made while the towing line was attached at three different points on the Fling. The third and fatal attempt was made when Klarman placed the towing line over a small contrivance, known as a "Merriman Winch," located on the port side of the Fling near the stern. The Merriman Winch was about four inches in diameter and was attached by five wood screws, each about three-quarters of an inch in length, to a wooden pedestal which was a part of the Fling. The Merriman Winch was designed for the purpose of trimming (raising and lowering) the so-called "Genova Sail," the mainsail of the sloop.

When the Marine I took up the strain on the line which was about 25 feet long, the winch pulled loose from its insufficient fastening, hurtled through the air and struck Santini in the head, throwing him overboard and causing serious injuries which resulted in his death 10 days thereafter.

The jurisdiction of the District Court was invoked and the litigation commenced by the filing of a petition for limitation or exoneration of liability by Klarman under the provisions of Sections 182 to 189 inclusive of Title

46, United States Code. By appropriate admiralty procedure, Santini's Estate filed its claim in the limitation proceeding and the Town of Westport and its Police Officer Kellogg were joined as parties with direct claims by Santini's Estate against all.

The State of Connecticut became obligated to and did make payment of compensation benefits under a Connecticut Workmen's Compensation Act, pursuant to the provisions of Section 28-14, Conn. Gen. Stat., as amended (a civilian defense oriented compensation statute). If the action results in recovery by Santini, the State of Connecticut is entitled to reimbursement out of any award of damages pursuant to Section 31-293, Conn. Gen. Stat.

Judge Murphy, to whom the case was tried, in admiralty, without a jury, found that the Fling was unseaworthy by reason of the inadequate fastening of the winch ("Appendix B," p. 39). In spite of this, however, and ignoring the decision of this Court in *Rogers against United States Lines*, 347 U. S. 984, 1954 A.M.C. 1088, he refused to find the Marine I unseaworthy or in violation of its duty to Santini. See also, *Petterson vs. Alaska Steamship Company, Inc.*, 205 F. 2d 478, 1953 A.M.C. 1405, aff'd 347 U. S. 396, 1954 A.M.C. 860, rehearing denied June 1, 1954 (1954 A.M.C. 1250).

In both of the above cited cases, this Court held that the ownership, or source of the unsuitable equipment which rendered a vessel unseaworthy, was irrelevant and, it is therefore submitted that the fact that the unseaworthy appurtenance of the Fling rendered the Marine I unseaworthy when it was adopted and used by Kellogg, commander of the "Marine I."

The Court of Appeals for the Second Circuit, in an opinion by Judge Jameson, Senior District Judge of the District of Montana (sitting by designation), with Judge Lumbard concurring, affirmed the judgment; Judge Hayes in a separate opinion dissented and voted to reverse the decision of the District Court and remand the case for determination of damages ("Appendix A, pp. 24-25").

Reasons for Granting the Writ.

1. *The decision of the Court of Appeals for the Second Circuit and of the District Court of Connecticut are in conflict with the decision of the Court of Appeals for the Fifth Circuit.*

In *Grigsby vs. Coastal Marine Service*, 412 F. 2d 1011, 5th Cir. 1969, petition for cert. dismissed, 396 U. S. 1033, the Fifth Circuit in a well reasoned opinion by Hon. John R. Brown, Chief Justice (concurred in by Judge Wisdom and now Chief Justice Burger), in a case where the ultimate facts bore a striking resemblance to the facts in this case, held that a land based watchman who met his death on a barge moored to the pier was entitled to the status and rights of a seaman. Judge Brown said:

> "Since in doing these humane acts, he was doing that which a seaman, responding to the call of the sea, would have done, he was, in a very real sense and in the Sieracki sense, doing the work of a seaman. He can accordingly, claim the rights of a vicarious seaman, including that of the warranty of seaworthiness." 412 F. 2d at 1022.

The decision of the Court of Appeals of this Circuit is also completely contrary to that of the District Court for the Eastern District of Pennsylvania, *Nikiforow vs. Rittenhouse*, 277 F. Supp. 608, where the facts were on all fours with the case at bar. In that case, Chief Judge

Lord, on a motion for partial summary judgment, commented:

> "Traditionally, when a vessel became stranded, the crew was not able to abandon its obligation to serve its ship." The Davidson, 50 F. 323, 324 (D. Wis. 1880).
>
> "Quite to the contrary, once a ship ran aground, the officers and crew had a duty to attempt everything within their means to free the vessel, whether by attempting to tow the ship free * * * to pull the vessel off the obstruction."

Chief Judge Lord concluded:

> "That the plaintiff was performing a service to defendant's vessel, with the defendant's express consent and authorization, that traditionally would have been done by the crew of defendant's vessel * * *" 277 F. Supp. at 611.

Judge Murphy, in his opinion (Appendix B, p. 36), observing Judge Friendly's comment in his book: *Federal Jurisdiction: General View,* commented that he could not accept the reasoning of these two cases or "believe the Supreme Court, after its 'return towards sanity' * * * would adopt such an extension of the concept of liability without fault."

Petitioner's counsel finds it difficult to reconcile Judge Murphy's inquiry, in his opinion at page 36:

> "*What service was he* (Santini) *performing for Klarman's sloop, the Fling? The most we can say is that Santini was a spectator and victim,*"

with the work which Santini was doing at the time.

Is this, then, a new class of Maritime Worker, to be designated a "Spectator and victim," without any rights to safety?

2. *The decision of the District Court and of the Court of Appeals for the Second Circuit ("Appendices A and B") are in direct conflict with the decisions of this Court.*

This Court has held in *Seas Shipping Co. vs. Sieracki*, 328 W.S. 85, that the duty to provide a seaworthy ship extends not only to the owner's employees but to all "who perform the ship's service with his consent or by his arrangement." Certainly, Santini was serving the owner of the Fling with the owner's consent and by his arrangement. See also *Pope and Talbot vs. Hawn*, 346 U. S. 406, 1954, A.M.C. 1.

3. *The decision of the Second Circuit in this case is in conflict with the decisions of this Court and the traditional rules for determining whether a person is a seaman within the meaning of the Jones Act and under the General Maritime Law.*

In *Cosmopolitan Shipping Co. vs. McAllister*, 337 U. S. 783, this Court held that, in determining a seaman's employer, a Court must look to the "plain and rational meaning of employment and employer."

In *Gerradin vs. United Fruit Co.*, 60 F. 2d 927, cert. denied 287 U. S. 642, the Court defined a seaman as "any person who is employed on board any vessel."

In "*The Falco*," 20 F. 2d 362, Judge Learned Hand (2nd Cir.) commented:

> "A ship may have a crew in port, and he had engaged to serve her in strictly Maritime duties, as much while at her berth as after she broke ground.
> "If a man is 'employed or engaged to serve in some capacity on board ship' he is a seaman within the meaning of our statutes."

4. *To refuse relief to Santini would deprive him of equal rights under the law.*

Unquestionably, Kellogg, his Commanding Officer, if injured or killed under the same or similar circumstances, would have a right to recovery. So, too, would a regular member of the Westport Police Force enjoy such rights.

5. *The decision in this case, if permitted to stand, it is submitted would act as a precedent, to discourage persons from volunteer service, since their status as public spirited unpaid volunteers would deprive them of the historic and traditional rights of others who do the same work for compensation.*

6. The opinions in the *Grigsby* and *Nikiforow* cases were written before the decision of this Court in *Moragne, Etc., vs. States Marine Lines, Inc.*, 398 U. S. 375, whereas the instant case was tried after the *Moragne* case, the *Moragne* case permitted recovery for wrongful death in inland waters of the United States, reversing "The Harrisburg," 119 U. S. 199, which had held that there was no basis for recovery under such circumstances. It is, therefore, submitted that this case is even stronger than either *Grigsby* or *Nikiforow*.

CONCLUSION.

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Dated: New York, New York,
November 15, 1974.

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APPENDIX A.

Opinion of the United States Court of Appeals for the Second Circuit.

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

No. 900-1, 999—September Term, 1973.
(Argued April 24, 1974 Decided September 3, 1974.)
Docket Nos. 73-2757, 73-2808, 73-2738

HOWARD KLARMAN,

Petitioner and Third-Party Plaintiff-Appellee,

v.

ROSE SANTINI, as Administratrix of the Estate of Aldo Santini, Deceased and THE STATE OF CONNECTICUT,

Claimants-Appellants,

v.

TOWN OF WESTPORT and FREDERICK KELLOGG, JR.,

Third-Party Defendants-Appellants-Appellees.

Before:

Lumbard and Hayes, Circuit Judges, and Jameson, District Judge.*

*Senior District Judge of the District of Montana, sitting by designation.

Appeal from judgment entered in the United States District Court for the District of Connecticut, Thos. F. Murphy, Judge, dismissing all claims of claimants-appellants against the petitioner and third-party defendants and the claim of third-party plaintiff against third-party defendants.

Affirmed.

Chester A. Hahn, Esq., Bridgeport, Connecticut (Schine, Julianelle, Karp, Gerety & Bozelko and Robert K. Killian, Attorney General of the State of Connecticut, on the Brief), for Claimants-Appellants.

Dion W. Moore, Esq., Bridgeport, Connecticut (Frederick L. Comley, Esq., Pullman, Comley, Bradley & Reeves, on the Brief), for Petitioner and Third-Party Plaintiff-Appellee.

Joseph T. Stearns, Esq., New York, New York (Robert K. Marzik, Esq., Stratford, Connecticut, Haight, Gardner, Poor & Havens, New York, New York, on the Brief, Hollis M. Walker, Jr., of counsel) for Third-Party Defendants-Appellants-Appellees.

JAMESON, District Judge:

Rose Santini, as administratrix of the Estate of Aldo Santini, Deceased, and The State of Connecticut have appealed from a judgment denying them recovery of damages from Howard Klarman, Town of Westport and Frederick Kellogg, Jr. as the result of a boating accident on the navigable waters of the Saugatuck River in Connecticut on July 26, 1964, in which Aldo Santini was fatally injured. The Town of Westport and Kellogg have appealed from the denial of their indemnity claim against Klarman for counsel fees and expenses.

The Accident

At about 4:30 P.M. on July 26, 1964 Klarman and several guests boarded the 28-foot Fling at Westport Harbor for a sail on Long Island Sound. Under power the Fling headed south along the main channel of the Saugatuck River. Near Buoy No. 13 off Bluff Point, it ran aground on the mud or sand bottom while being piloted by Klarman's brother-in-law. Klarman attempted unsuccessfully to back out of the strand by using the Fling's engine. A private motor cruiser was hailed and also tried unsuccessfully to free the Fling by towing from her bow.

At about 4:45 P.M. the Marine I arrived on the scene. The Marine I, a 26-foot launch powered by a 125 horsepower engine, was owned by the Town of Westport and operated as a patrol boat by its Police Department. It was under the command of Kellogg, a member of Westport Police Department.

Aldo Santini was aboard the Marine I as a volunteer member of the Westport Civil Defense, receiving on-the-job training as an auxiliary police officer.[1] This was his first and only time aboard the Marine I. Kellogg testified that Santini was not "more or less permanently attached" to the Marine I, that the sole reason for his presence on the launch was to receive on-the-job training, and that he was not really "supposed to do anything". Kellogg normally operated the Marine I by himself, the only exception being when an auxiliary policeman was assigned to accompany him on patrol.

Klarman hailed Kellogg for assistance. Prior to rendering aid, Kellogg prepared and had Klarman sign an agreement by which he accepted "full responsibility" for being towed and promised "to pay for all damages which may occurr".

[1]Santini had been a member of the auxiliary police force since 1954 and received no compensation for his services.

Thereafter, a line approximately 28 feet in length and one-half inch in diameter, with a bowline knot at one end and a back splice at the other, was passed from the Fling to the Marine I.[2] The bowline knot was placed over the Samson post in the bow of the Fling, and the other end was secured by Santini to a towing bar in the stern of the Marine I. The Marine I then attempted unsuccessfully to free the Fling by pulling for 15 to 20 seconds forward and to port at approximately a 45 degree angle to the bow of the Fling.

A second attempt, from the stern, was also unsuccessful. Klarman testified that he placed the bowline knot on a cleat at the Fling's stern, and ran the line through a chock on the starboard side of the taffrail.[3] Klarman then handed the other end of the rope to the Marine I, and again it was secured by Santini to the towbar. The Marine I commenced towing at a 40 degree angle to the Fling's port stern. Klarman noticed that the chock had loosened due to the stress of the tow, and accordingly called a halt to the second attempt.

On the third attempt Klarman secured the bowline knot by doubling it on the port-side Merriman winch, located near the stern of the Fling at the after-end of the cockpit. Klarman testified that the winch was primarily used to sheet the Genova sail and for mooring, but that on one prior occasion, in the summer of 1962, it was used as the point of attachment during a towing operation when the Fling had run "aground in Watch Hill and [was] hauled off a ledge from the stern".

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[2]The line was owned and selected by Klarman. He testified that it was regularly used as "a mooring line" and that it had been used in the earlier unsuccessful towing attempt by the private cruiser. Kellogg testified that "As a rule we accepted lines from other vessels. We did not use our own lines. This was a verbal hand-me-down rule by the department."

[3]Kellogg, on the other hand, testified that Klarman used the starboard winch near the stern of the Fling, rather than the cleat.

The other end of the line remained fastened to the Marine I, and towing was resumed in an almost broadside direction. During this operation the winch tore loose from its pedestal and struck Santini in the head, knocking him overboard. Santini was rescued and taken to Norwalk Hospital, where he died on August 1, 1964.

Proceedings in District Court

Klarman, owner of the Fling, filed a petition in admiralty seeking exoneration from or limitation of liability.[4] Rose Santini, as administratrix of her husband's estate, answered the petition and filed a claim against Klarman, contending that the death of her husband was due to Klarman's negligence and that he had the requisite privity and knowledge. The State of Connecticut also appeared as a claimant, seeking reimbursement for compensation benefits paid to the deceased's family under the Connecticut Workmen's Compensation Act.

Klarman was granted leave to implead the Town of Westport, owner of the Marine I, the other vessel involved in the accident, and Frederick Kellogg, Jr., commanding officer of the Marine I. *Petition of Klarman*, 270 F. Supp. 1001 (D. Conn. 1967). Klarman's third-party complaint alleged on behalf of Mrs. Santini (1) a claim against the Town of Westport under the Jones Act, 46 U.S.C. §688 and the unseaworthiness of Marine I; and (2) a claim against Kellogg based upon his alleged negligence. On his own behalf Klarman claimed that he was entitled to indemnity or contribution for any damages which Mrs. Santini might recover against him.

At the trial Mrs. Santini moved to amend her answer to the limitation petition to assert a wrongful death action

[4]Under 46 U.S.C. §183(a) the liability of the owner of a vessel for any act done without his privity or knowledge shall not exceed the amount or value of the interest of the owner in the vessel. By stipulation the value of the Fling was fixed at $7,500.

under *Moragne v. States Marine Lines*, 398 U. S. 375 (1970),[5] and to amend Klarman's third-party complaint so that the claims stated on her behalf would be in her own name and right. The Town of Westport moved to amend its third-party answer to include a counterclaim against Klarman for indemnity. Both motions were granted at the close of the trial.

As the district court stated, under a "complex limitation proceeding admiralty", Mrs. Santini in effect was "suing Klarman, Westport and Kellogg as tort-feasors for the wrongful death of her husband", claiming he was killed as a result of their negligence "and/or the unseaworthiness of the Fling and/or Marine I". The principal areas of dispute in the non-jury trial concerned the propriety of the tow employed and the fitness and adequacy of the Merriam winch, its fastenings, and the towrope. On these issues the court heard testimony from Klarman, Kellogg and five experts—three on behalf of Klarman (Blumenstock, Atkins and Raymond), one on behalf of Kellogg and the Town of Westport (Love) and one on behalf of Santini (Prosser). The testimony of these witnesses was conflicting.

Following the trial, the district court in a detailed and well considered opinion based on its findings of fact concluded that:

(1) Aldo Santini was not a "seaman" within the contemplation of the Jones Act;

(2) the defendants Kellogg, Klarman and Town of Westport were not negligent;

(3) the Marine I was not unseaworthy;

(4) the Fling was unseaworthy;

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[5]This case, which was decided after the filing of Santini's answer, held that a longshoreman's wife could maintain an action under federal maritime law based upon unseaworthiness, for the wrongful death of her husband within state territorial waters.

(5) Santini was not within the class of persons protected by Klarman's warranty to provide a seaworthy vessel. The court therefore denied recovery to Mrs. Santini and The State of Connecticut and dismissed Klarman's third party complaint.

Kellogg and the Town of Westport moved to amend the findings to provide for recovery of attorney fees and expenses from Klarman. Prior to the court's decision on this motion, Kellogg and the Town of Westport filed their notice of appeal. The district court noted that "such appeal ousts this Court from any jurisdiction to further consider third-party defendants' motion", but issued a brief memorandum indicating that it "would have denied the motion".

Mrs. Santini and The State of Connecticut have appealed from that portion of the judgment denying them relief against Klarman, Kellogg and the Town of Westport. Kellogg and the Town of Westport have cross-appealed from the portion of the judgment which in effect denied them indemnity from Klarman for attorney's fees and expenses.

Appeal of Mrs. Santini and The State of Connecticut

At the outset we note that many of the issues on this appeal involve the district court's resolution of disputed issues of fact. It is well settled that "In reviewing a judgment of a trial court, sitting without a jury in admiralty, the Court of Appeals may not set aside the judgment below unless it is clearly erroneous", and that "A finding is clearly erroneous when, 'although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed' * * *." *McAllister v. United States*, 348 U. S. 19, 20 (1954). Although this court adheres to the rule that findings with respect to negligence and seaworthiness, as distinguished from the evidentiary facts upon which they are based, are not entitled to the benefit of the "clearly

erroneous" rule, we have held that "such findings are entitled to great weight and will ordinarily stand unless the lower court manifests an incorrect conception of the applicable law". *In re Marine Sulphur Queen*, 460 F. 2d 89, 97-98 (2 Cir. 1972).

Jones Act Claim

The district court's denial of recovery under the Jones Act rests upon its conclusion that Aldo Santini was not a "seaman" within the meaning of the Act. As the court recognized, requirements for a Jones Act seaman are that "the vessel must be in navigation, there must be a more or less permanent connection with the ship, and the worker must be aboard naturally and primarily as an aid to navigation". *Harney v. William M. Moore Building Corporation*, 359 F. 2d 649, 654 (2 Cir. 1966). While these requirements have not been interpreted strictly, they are not meaningless. Although the connection with the vessel "may be less than permanent, * * * it cannot be temporary or transitory". *Bullis v. Twentieth Century Fox Film Corporation*, 474 F. 2d 392, 394 (9 Cir. 1973). Although "aid to navigation" has been read "very broadly", *Harvey, supra* at 654, it is nevertheless required that an alleged seaman "perform services upon ships and [be] exposed to the unique hazards of work upon the sea". *Mahramas v. American Export Isbrandtsen Lines, Inc.*, 475 F. 2d 165, 170 (2 Cir. 1973).

The court concluded that Santini was not a seaman since his connection with the Marine I was temporary and he was not assigned to specific duties; that "he was for all practical purposes really an observer and not a seaman". Accordingly the court held that his widow had no claim under the Jones Act, "even assuming that the Town of Westport was his employer".[6]

[6]As the court recognized, the Jones Act applies only between employees and their employers. *Mahramas v. American Export Isbrandtsen Lines, Inc.*, 475 F. 2d 165, 170 (2 Cir. 1973).

Upon a review of the evidence we cannot say that the conclusion of the district court was legally erroneous or not supported by substantial evidence. Prior to the date of the accident Santini had never been aboard the Marine I, and there was no evidence that he would have been reassigned to the launch. It is true, as Mrs. Santini argues, that her husband was under the control of Kellogg, and that Kellogg testified that Santini had "assisted in general" on the Marine I, had made fast the lines during docking, and had retrieved and secured towlines to the Marine I during the first and second attempt to free the Fling. On the other hand, Kellogg also testified that Santini was not "supposed to do anything", and that his sole purpose aboard the vessel was to receive on-the-job training in civil defense, that is, as Kellogg put it, "He was assigned to be given instructions in the operation of the boat." Although conflicting inferences may be drawn with respect to Santini's role on the Marine I, we cannot say that the district court erred in concluding, as it did, that Santini was not a seaman within the meaning of the Jones Act.

Negligence of Kellogg and
Unseaworthiness of Marine I

Appellants specify 12 acts of alleged negligence by Kellogg and contend that "Kellogg rendered the police launch unseaworthy by seeking to tow the Fling free with the conditions which then and there existed and which were activated by his own action". The trial court held that Kellogg's "conduct in attempting to free the Fling was in all respects proper, and that he exercised reasonable care and good seamanship in doing what he did to relieve the stranded sloop". Our review of the evidence reveals little or no proof in support of many of the alleged acts of negligence. With respect to the remaining allegations, the evidence was conflicting. We, therefore, cannot say that the court's findings in favor of Kellogg and the Town of

Westport were not without substantial evidentiary support or were clearly erroneous.[7]

Our conclusion that the district court was justified in finding that Kellogg's conduct was proper also disposes of appellants' contention that Kellogg's actions rendered the Marine I unseaworthy. Appellants suggest also that the inadequacy of the fastenings of the Fling's winch rendered the Marine I unseaworthy. It is clear, however, that the warranty of seaworthiness is owed by the shipowner only with respect to his "vessel or its appurtenant appliances", *Seas Shipping Co. v. Sieracki*, 328 U. S. 85, 90 (1946), and of course the winch was not an appliance of the Marine I. See also *Mosley v. Cia Mar. Adra, S. A.*, 314 F. 2d 223, 228 (2 Cir. 1963).

Klarman's Negligence

The district court stated that, "The negligence charged to Klarman is a grapeshot of allegations but very little proof." We cannot say that his findings that "Klarman's conduct was not negligent in any respect" and that "he acted in the manner of a reasonably prudent owner of a sloop that was grounded" are clearly erroneous.

Although the court held that the winch fastenings were inadequate, Klarman testified that he had no knowledge of the nature of the winch's fastenings. It was undisputed that the screws which secured the winch could only be examined following a removal of the winch drum.[8] Klarman

[7]Since the district court found that Kellogg was not negligent, it was unnecessary to consider the effect of the fellow servant rule, the Connecticut Workmen's Compensation Act, Conn. Gen. Stat. §§ 31-284 and 293(a), or the Longshoreman's and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq.*

[8]Although Prosser testified that the winch should have been bolted, and that the bolts would be visible from an inside-the-boat inspection of the winch pedestal, the other four experts agreed that wood screws were an adequate and proper means of securing the winch.

testified that he had never removed the drum, and there was no convincing evidence that he should have done so. In addition, Klarman's testimony was uncontradicted that prior to the accident there was no external sign of any weakness in the winch fastenings, and that on one prior occasion the winch had been successfully used to tow the Fling off a sand bar.

It is true, as appellants argue, that there was expert testimony that the winch should not have been used as the sole point of contact for the towrope. On the other hand, there was also testimony from Raymond and Blumenstock that the port winch alone was a suitable object upon which to fasten the towline. The district court resolved "the conflict between the experts" in Klarman's favor, and we were unable to perceive any error in its having done so.

Unseaworthiness of the Fling

The district court found the Fling unseaworthy because of the inadequacy of the screws which secured the port winch. The court concluded, however, that Santini was not within the class of persons protected by Klarman's warranty to provide a seaworthy vessel. We agree.

The leading case with respect to the scope of the class of persons protected by a shipowner's warranty of seaworthiness, is *Seas Shipping Co. v. Sieracki, supra.* There the Court extended the warranty of seaworthiness, traditionally owed to crew members, to a stevedore who was injured while aboard and loading the ship. The Court reasoned that the stevedore was in effect a seaman "because he was doing a seaman's work and incurring a seaman's hazards". 328 U. S. at 99.

Although Santini was not a member of the Fling's crew, it is argued that in receiving and securing the towline to the Marine I he was performing work for the Fling tra-

ditionally done by seamen, and that accordingly he became as to the Fling a "*Sieracki* Seaman".

Appellant's contention finds some support in *Grigsby v. Coastal Marine Service of Texas, Inc.*, 412 F. 2d 1011 (5 Cir. 1969), *cert. dismissed*, 396 U. S. 1033 (1970), and *Nikiforow v. Rittenhouse*, 277 F. Supp. 608 (E.D. Pa. 1967). In *Grigsby* the warranty of seaworthiness was extended to a land-based guard who died while attempting to effect a rescue aboard a sea-going barge. The court stated:

> "His impulsive action in the best tradition of the sea gave him this highly preferred status. Since in doing these humane acts, he was doing that which a seaman responding to the call of the sea would have done, he was, in a very real sense and in the *Sieracki*-sense, doing the work of a seaman. He can accordingly claim the rights of a vicarious seaman including that of the warranty of seaworthiness." 412 F. 2d at 1022.

Nikiforow involved a situation factually similar in many respects to this case. There it was held that the defendant shipowner's warranty of seaworthiness extended to the plaintiff, a member of the crew of a Coast Guard cutter who was blinded when a stanchion post of defendant's vessel broke loose during an attempt to tow it off a sand bar. The court reasoned that under *Sieracki* the plaintiff was entitled to the warranty of seaworthiness, since he was performing a service for defendant's vessel "that traditionally would have been done by the crew of defendant's vessel",[9] but which "under modern division of labor * * * is performed by members of the Coast Guard, espe-

[9]The court noted that "once a ship ran aground, the officers and crew had a duty to attempt everything within their means to free the vessel, whether by attempting to tow the ship free by manning the long boats, or by carrying out anchors and attempting to pull the vessel off the obstruction." 277 F. Supp. at 611.

cially in situations involving pleasure craft in inland waters". 277 F. Supp. at 611.

The district court declined to accept the reasoning of *Grigsby* and *Nikiforow*, stating that it did not "believe the Supreme Court * * * would adopt such an extension of the concept of liability without fault". In addition, the court distinguished those cases on the ground that no act of rescue could be attributed to Santini, who was merely "a spectator and a victim".

While not determinative of this action, it is noted that subsequent to the decisions in *Grigsby* and *Nikiforow*, Congress eliminated the longshoreman's claim for unseaworthiness and the action over the shipowner. The 1972 amendments to the Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C. §901 *et seq.*, provide that a longshoreman's personal injury action against a shipowner is limited to claims based upon negligence and that the "liability of the vessel * * * shall not be based upon the warranty of seaworthiness or a breach thereof * * *". 33 U.S.C. §905(b).

The legislative history of the 1972 amendments indicate Congressional dissatisfaction with the extension of the warranty of seaworthiness initiated by the decision in *Sieracki*. The Report of the House Education and Labor Committee noted

> "that the seaworthiness concept was developed by the courts to protect seamen from the extreme hazards incident to their employment which frequently requires long sea voyages and duties of obedience to orders not generally required of other workers. The rationale which justifies holding the vessel absolutely liable to seamen if the vessel is unseaworthy does not apply with equal force to longshoremen and other non-seamen working on board a vessel while it is in port. * * *

> "The purpose of the amendments is to place an employee injured aboard a vessel in the same position he would be if he were injured in non-maritime employment ashore, insofar as bringing a third party damage action is concerned, and not to endow him with any special maritime theory of liability or cause of action under whatever judicial nomenclature it may be called, such as 'unseaworthiness', 'nondelegable duty', or the like." H. R. Rep. No. 1441, 92nd Cong., 2d Sess. (1972).[10]

It is clear that Congress is not in accord with the extension of the warranty of seaworthiness represented by *Sieracki* and its progeny. This affords an additional reason why the *Sieracki* rule should not be extended further in line with *Grigsby* and *Nikiforow*.

In addition, we agree with the district court that *Grigsby* and *Nikiforow* are distinguishable. As noted *supra*, *Grigsby* involved an affirmative act of rescue, whereas here Santini merely received and secured the towlines to the Marine I.[11] Santini was not a member of the crew of the Marine I, as was the plaintiff in *Nikiforow*. As discussed, *supra*, with respect to the Jones Act claim, Santini was on the Marine I for the purposes of observing what the police were doing and learning the reasons therefor,

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[10]The amendments also provided for an increase in compensation benefits, thus affording an additional reason for eliminating the longshoreman's claim for unseaworthiness. Mrs. Santini of course is not receiving compensation under the Longshoremen's and Harbor Workers' Compensation Act, but is receiving compensation benefits from the State of Connecticut under its Workmen's Compensation Act.

[11]As the district court said, "What art of rescue can be attributed to him? What humane act was Santini doing in responding to the call of the sea? What service was he performing for Klarman's sloop, the Fling? The most we can say is that Santini was a spectator and a victim."

and he was not required or duty-bound to perform any services in connection with the operation of the launch.

Cross Appeal of Kellogg and Town of Westport

Kellogg and the Town of Westport have cross-appealed, contending that the district court erred in refusing to grant them attorney's fees and expenses incurred in the defense of this action. As noted, *supra*, the court declined to rule on this claim due to the fact that Kellogg and the Town of Westport filed their notice of appeal prior to the motion to amend the findings to include an award of fees and expenses. The court did, however, indicate that it would have denied the motion, principally on the grounds that (1) Kellogg and the Town of Westport failed to request attorney's fees "if they are successful in dismissing the third-party complaint"; and (2) the agreement which Klarman signed, promising "to pay for all damages which may incur", was simply "an agreement for indemnification for damages incurred in a negligent rescue".

We agree with appellants that their failure to specifically request attorney's fees and expenses in the event of dismissal of the third-party complaint does not in itself prevent their recovery. Rule 54 of the Federal Rules of Civil Procedure provides that "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party had not demanded such relief in his pleadings". See *Paliaga v. Lukenbach Steamship Company*, 301 F. 2d 403, 410 (2 Cir. 1962).

We are satisfied, however, that the district court's interpretation of the agreement signed by Klarman is correct. The cases cited by Kellogg and the Town of Westport deal either with express warranties, made in a strictly commercial setting, to indemnify and hold harmless the party claiming fees,[12] or with the breach of a stevedore's implied

[12]See, e. g., *California Tanker Co. v. Todd Shipyards Corp.*, 339 F. 2d 426 (2 Cir. 1964); and *Moses-Ecco Company v. Roscoe-Ajax Corporation*, 320 F. 2d 685, 690 (D.C. Cir. 1963).

warranty to perform contracted-for services in a workmanlike manner,[13] none of which have any application to the facts of this case.

Affirmed.

HAYS, Circuit Judge (dissenting):

I dissent.

Santini was clearly a "seaman" within the meaning of the Jones Act, 46 U.S.C. §688 (1970). The majority holds the contrary on the grounds that he was an "observer" who "was not supposed to do anything" and that "there was no evidence he would have been reassigned to the launch." It is uncontroverted in the record, and the majority recognizes, that Santini was aboard the launch to receive on-the-job training in the operation of the launch as part of a formal program for volunteers. Even if his duty was merely to observe the operation of the launch, he must be considered a seaman. There is no reason to believe that a trainee does not become a seaman for purposes of the Jones Act until his training period has ended. Moreover, Santini took an active part in the efforts to dislodge *The Fling*. He performed the tasks which would ordinarily have been performed by any seaman aboard a launch like *Marine I*. This court has recognized the broad definition given to the term "seaman." *Mahramas v. American Export Isbrandtsen Lines, Inc.*, 475 F. 2d 165,

[13] See *Williams v. Pennsylvania Railroad Company*, 313 F. 2d 203, 212-213 (2 Cir. 1963). As we pointed out in *Falletta v. Costa Armatori*, 476 F. 2d 316, 317 at n. 1 (2 Cir. 1973), the 1972 amendments to the Longshoreman's and Harbor Worker's Compensation Act also eliminated stevedore indemnity to the shipowner, based upon a breach of the warranty of workmanlike service. The limitation of the shipowner's liability to his own negligence obviates the need for indemnity from the stevedore, and thus the amendments provide that the stevedore-employer shall not be held liable to a shipowner for damages paid by the latter to longshoremen, and that warranties to the contrary shall be void. 33 U.S.C. §905(b).

170 (2d Cir. 1973). In *Mahramas* we adhered to the test established in *Gerradin v. United Fruit Co.*, 60 F. 2d 927 (2d Cir.), cert. denied, 287 U. S. 642 (1932), that seaman includes anyone engaged to serve in any capacity on board.

Klarman owed Santini a duty to provide a seaworthy vessel. *Seas Shipping Co. v. Sieracki*, 328 U. S. 85 (1946). *Sieracki* held that the duty of seaworthiness extends not only to those directly employed by the shipowner but to all who "perform the ship's service * * * with his consent or by his arrangement." 328 U. S. at 95.

The Longshoreman's and Harbor Worker's Compensation Act, as amended, 33 U.S.C. §901-50 (1970 & Supp. II 1972), is irrelevant here not merely because the 1972 amendments were enacted after the accident in question but, more important, because Santini would not have come within the coverage of the act as provided in section 903(a).

I would reverse the decision of the district court and remand the case for determination of damages.

APPENDIX B.

Opinion by Murphy, D.J., Dated August 16, 1973 (Findings of Fact and Conclusions of Law).

UNITED STATES DISTRICT COURT,

DISTRICT OF CONNECTICUT.

HOWARD KLARMAN,

Petitioner and Third-Party Plaintiff,

v.

ROSE SANTINI, Administratrix, and THE STATE OF CONNETICUT,

Claimants,

v.

TOWN OF WESTPORT and FREDERICK KELLOGG, JR.,

Third-Party Defendants.

In Admiralty No. 4788

Pullman, Comley, Bradley & Reeves by Frederick L. Comley, Esq., For Petitioner and Third-Party Plaintiff.

Robert Julianelle, Esq., by Chester A. Hahn, Esq., For Claimant Rose Santini.

Robert K. Marzik, Esq., Haight, Gardner, Poor & Havens, by Hollis M. Walker, Jr., Esq., Joseph T. Stearns, Esq., For Third-Party Defendants.

MURPHY, D. J.:

A bizarre accident on the navigable waters of the Saugatuck River in Connecticut resulting in the death of one Aldo Santini triggered this complex limitation proceeding in admiralty.

In the late afternoon of July 26, 1964, Howard Klarman, owner of the 28-foot auxiliary sloop Fling, and several guests—his brother-in-law, two of his sons and two of their young friends—boarded the Fling at the Saugatuck Harbor Yacht Club, Westport Harbor, for a sail on Long Island Sound. The Fling, under power, headed south along the main channel of the Saugatuck River, and near Can No. 13 off Bluff Point ran aground while being conned by Klarman's brother-in-law. Klarman took command and tried unsuccessfully to motor her off. A private motor cruiser was hailed and tried, also unsuccessfully, to free the Fling by towing from her bow.

As the cruiser was attempting to free the Fling, Marine I happened on the scene. Marine I was a 26-foot launch powered by a 125 h.p. gas engine, owned by the Town of Westport and operated by the Police Department of Westport under the command of Frederick Kellogg, Jr., a member of the Westport Police Department. Aldo Santini, who was regularly employed by Bridgeport Brass Company as a presser, was aboard the Marine I as a volunteer member of the Westport Civil Defense, receiving on-the-job training as a voluntary auxiliary police officer.

Klarman hailed Officer Kellogg for assistance. Kellogg prepared a handwritten agreement* prior to rendering any assistance, which Klarman signed. Thereafter

*It read as follows:

"7/26/64 4:50 p.m. I owner of CT/3712-C accept full responsibility for my being towed by the Westport police boat. I accept and promise to pay for all damages which may occur. Owner H. Klarman."

a line* approximately 28 feet in length and ½ inch in diameter with a bowline knot at one end and a back splice at the other, owned and selected by Klarman, was passed from the Fling to Marine I. The bowline knot was passed over the samson post in the bow of the Fling and the other end was secured to a towing bar in the stern of Marine I. The police launch thereupon commenced to pull forward and to port at approximately a 45 degree angle to the bow of the sloop for 15 or 20 seconds, without any success in freeing the Fling.

A second attempt was made, this time to pull the Fling from its stern. Klarman testified that he put the bowline knot on a cleat on the stern of the Fling and ran the line through a chock on the starboard side of the taffrail and then handed the other end to the Marine I, where it was made fast to her tow bar. Kellogg testified that Klarman used the starboard winch near the stern of the Fling and not a cleat. Marine I tried to free the Fling by towing it at a 40 degree angle to the Fling's port stern. Klarman, noticing the stress exerted on the chock by the line leading at an angle from it to the launch, called an end to that operation.

On the third attempt Klarman secured the bowline knot by doubling it on the port Merriman winch, located at the after end of the cockpit on the port side of the sloop. The other end of the line was still fastened to the police launch, and the towing was resumed, almost in a broadside direction. It was during this operation that the winch tore loose from its pedestal and was propelled toward the launch, striking Santini in the head and knocking him overboard. Santini was rescued and taken to Norwalk Hospital, where he died on August 1, 1964.

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*Klarman testified that this line had been used in the earlier unsuccessful attempt by the cruiser and that it was his regular mooring line.

On January 25, 1965, Klarman, as owner of the Fling, filed a petition in this Court for exoneration from, or limitation of, liability (46 U.S.C. §181 *et seq.*). The value of the Fling was fixed at $7,500.

Rose Santini, as Administratrix of the estate of her husband, Aldo Santini, answered the petition on March 11, 1965. It was her claim that the death of her husband was due to the negligence of Klarman, and that Klarman had privity and knowledge of those events. She prayed therefore that Klarman's petition be denied and that she be compensated for her loss.

On May 19, 1965, the State of Connecticut filed its answer to the petition. It adopted Santini's allegations, and sought reimbursement out of any damages awarded to Santini for sums which the State had paid, or would become obligated to pay, under the terms of the Connecticut Workmen's Compensation Act.

On July 17, 1967, then Chief Judge Timbers granted Klarman's motion to implead the Town of Westport and Frederick Kellogg, Jr. into this limitation proceeding as parties who may be directly liable to Santini and as parties liable to Klarman by way of reimbursement or contribution. *Petition of Klarman*, 270 F. Supp. 1001 (D. C. Conn. 1967). Accordingly, Klarman filed a third-party complaint alleging (1) on behalf of Santini a claim against the Town of Westport under the Jones Act (46 U.S.C. §688) and the unseaworthiness of Marine I; (2) a claim for negligence on behalf of Santini against Kellogg; and (3) on his own behalf he claimed that he was entitled to indemnity or contribution for any damages which Santini might recover against him.

Westport's and Kellogg's answer to the third-party complaint raised substantial defenses, viz., (1) that the workmen's compensation payment precludes recovery, since it is the exclusive remedy under Connecticut law,

Conn. Gen. Stat. §§ 31-180, 150a; (2) failure to give notice of claim to the municipality of Westport pursuant to Connecticut law, Conn. Gen. Stat. §7-465; (3) release; (4) immunity under Conn. Gen. Stat. §28-13.

Thereafter, Santini moved for summary judgment seeking dismissal of the petition of Klarman. This motion was denied on December 19, 1968 by Chief Judge Timbers. *Petition of Klarman*, 295 F. Supp. 1021 (D. C. Conn. 1968).

On April 19, 1970 the parties agreed to a pretrial order which was made on that date.

On June 15, 1970 the third-party defendants moved to amend their answer to assert a claim for indemnity against Klarman based on the agreement Klarman signed. This motion was denied on January 18, 1971 by Chief Judge Timbers.

At trial Santini moved to amend her answer to the limitation petition to assert a wrongful death action under *Moragne v. States Marine Lines, Inc.*, 398 U. S. 375 (1970), which was decided after the filing of her answer, and to amend Klarman's third-party complaint so that Santini's claim would be in her own name and right. Westport moved to amend its third-party defendant's answer to assert laches under the General Maritime Law to the wrongful death claim and to amend to include a counterclaim for indemnity against Klarman based upon the contract signed by Klarman. Rulings on all of these motions were reserved by the Court and are now granted.

As a result, what was once a simple garden variety limitation proceeding has boiled into a veritable gallimaufry of real or imaginary admiralty claims and defenses. To deal with the issues in the simplest manner, we will recast Santini as if she was plaintiff, and Klarman, Westport and Kellogg were defendants.

Santini, either by her answer or as beneficiary of Klarman's third-party complaint, or under an amended an-

swer, as requested at trial, is in effect suing Klarman, Westport and Kellogg as tort-feasors for the wrongful death of her husband. She claims her husband was killed as a result of the negligence of all three, Klarman, Westport and Kellogg, and/or the unseaworthiness of the Fling and/or Marine I.

Since different theories of liability are advanced, we will discuss them separately, and start with the Jones Act claim.

This claim of Santini's is against the Town of Westport and is based upon the statute, 46 U.S.C. §688, which permits a seaman to sue his employer for personal injury caused by the employer's negligence, or in case of his death his personal representative may sue.

Accordingly, the first question to be resolved is whether Aldo Santini was a seaman. The general rule relating to the navigable waters of the United States is that only a master or member of the crew is entitled to recover under the Jones Act. Jones Act, 46 U.S.C. §688; Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §903(a) (1). "And it has been said that to be a member of the crew the vessel must be in navigation, there must be a more or less permanent connection with the ship, and the worker must be aboard naturally and primarily as an aid to navigation." *Harney v. William M. Moore Building Corp.*, 359 F. 2d 649, 654 (2d Cir. 1966).

We will assume that Santini, although on board the Marine I as an on-the-job auxiliary police trainee, qualifies as a member of the crew. The second test is whether he had any permanent connection with the launch. The cases hold that such a connection may be less than permanent. *Weiss v. Central Ry. of N. J.*, 235 F. 2d 309 (2d Cir. 1956), but on the contrary, it cannot be temporary or transitory. *Bullis v. Twentieth Century Fox Film Corp.*, 474 F. 2d 392, 394 (9th Cir. 1973); *Rotolo v. Hal-*

liburton Co., 317 F. 2d 9, 13 (5th Cir.), cert. denied, 375 U. S. 852 (1963); *Thibodeaux v. J. Ray McDermott & Co.*, 276 F. 2d 42 (5th Cir. 1960).

There is no dispute that July 26, 1964 was the only day that Santini was on the police launch. He had been an auxiliary policeman receiving on-the-job training for seven years, but never aboard any boat until this eventful day. Even on the day in question he was assigned to no specific duties. Despite the fact that he assisted on the first and/or second occasions to secure one end of the towing line, we hold that such activity was purely fortuitous.

The third requirement has been extended to those not necessary to the actual navigation of the ship but who are performing various services and are exposed to the unique hazards of work on the sea. *Mahramas v. American Export Isbrandtsen Lines, Inc.*, 475 F. 2d 165, 170 (2d Cir. 1973). Santini had no such duties. He was for all practical purposes really an observer and not a seaman. Accordingly, we hold that his widow has no claim under the Jones Act, even assuming that the Town of Westport was his employer.*

*The Jones Act applies only between employees and their employers, *Mahramas v. American Export Isbrandtsen Lines, Inc.*, 475 F. 2d 165, 170 (2d Cir. 1973). The Supreme Court in *Cosmopolitan Shipping Co. v. McAllister*, 337 U. S. 783, 791 (1949), made it clear that under the Jones Act only one person, firm or corporation can be sued as employer. "In determining a seaman's employer, a court must look to 'the plain and rational meaning of employment and employer,' *Cosmopolitan Shipping, supra*, at 791, which means that the right of control is one of the most important factors to consider, *United States v. W. M. Webb, Inc.*, 397 U. S. 179, 192 (1970); *Savard v. Marine Contracting, Inc.*, 471 F. 2d 536 (2d Cir. 1972)." *Mahramas v. American Export Isbrandtsen Lines, Inc.*, 475 F. 2d at 171. There is no evidence that the Town of Westport did not have the right to control Santini while he was receiving on-the-job training as an auxiliary police officer.

Santini has advanced a number of alternate claims based upon the doctrine of unseaworthiness. These claims are against Klarman because of the unseaworthiness of the sloop Fling, and the Town of Westport because of the unseaworthiness of the police launch Marine I.

Accordingly, it becomes relevant to define the terms and parameters of this type of claim.

It is too late to argue that the modern American concept of the warranty of seaworthiness is without foundation. *Mitchell v. Trawler Racer, Inc.*, 362 U. S. 539, 550, 570 (1960) (Frankfurter and Harlan, JJ., dissenting opinions). We start, therefore, with the proposition, "[t]hat the vessel and her owner are • • • liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship." *The Osceola*, 189 U. S. 158, 175 (1903). It is a species of liability without fault, *Sea Shipping Co. v. Sieracki*, 328 U. S. 85, 96 (1946), and wholly distinct from liability based on negligence, *Usner v. Luckenbach Overseas Corp.*, 400 U. S. 494, 498 (1971). It is a condition which arises from a defect in a vessel's hull, gear, appurtenances, and in some circumstances her crew. "What has been said is not to suggest that the owner is obligated to furnish an accident-free ship. The duty is absolute, but it is a duty only to furnish a vessel and appurtenances reasonably fit for their intended use. The standard is not perfection, but reasonable fitness; not a ship that will weather every conceivable storm or withstand every imaginable peril of the sea, but a vessel reasonably suitable for her intended service." *Mitchell v. Trawler Racer, Inc.*, 362 U. S. 539, 550 (1960).

In *Sieracki* the Supreme Court expanded the class of those who may avail themselves of the warranty of seaworthiness to all of those doing work traditionally performed by members of a ship's crew. In *Usner v. Lucken-*

bach, supra, the history of the *Sieracki* doctrine was summarized as follows:

> "We may accept it as fully settled that a shipowner's liability for an unseaworthy vessel extends beyond the members of the crew and includes a longshoreman like the petitioner. We may accept it as settled, too, that the shipowner is liable though the unseaworthiness be transitory, and though the injury be suffered elsewhere than aboard the ship." 400 U. S. at 497-498 (fn. omitted).

With these principles in mind, we should next determine whether Aldo Santini was a seaman, or a *Sieracki*-type seaman, in order to be able to claim the benefits of the doctrine of unseaworthiness. Although she is suing both owners (Klarman and Westport) on the claim that either or both of their crafts were unseaworthy, we need only consider her claim against Klarman, since later in our findings we hold that Marine I was not unseaworthy in any respect, and that the Fling was unseaworthy. The only question, therefore, is whether Klarman, the owner of the Fling, owed Santini the absolute right to a seaworthy sloop called the Fling.

Santini was not a member of the Fling's crew (assuming the Fling had a crew) and was never aboard her. We have been taught that a *Sieracki*-type seaman doesn't have to be physically aboard the ship to qualify. *Gutierrez v. Waterman S. S. Corp.*, 373 U. S. 206 (1963). It is only logical that he must, in order to qualify, have been doing something for the Fling which can be characterized as seaman's work. We have a visceral reaction that the Supreme Court never intended, in its 25-year extension of the doctrine of unseaworthiness, to include Santini as a beneficiary. Yet there are two reported cases that experienced little or no difficulty in so extending the doctrine. Perhaps the only realistic test should be: Did the accident happen on navigable waters?

In *Grigsby v. Coastal Marine Service of Texas, Inc.*, 412 F. 2d 1011, 1022 (5th Cir. 1969), *petition for cert. dismissed*, 396 U. S. 1033 (1970), the doctrine was extended to an amphibious good Samaritan, that is, a land-based watchman who met his death on a barge moored to a pier on the Mississippi when he attempted to rescue an unknown worker in a wing of a tank on the barge. The Fifth Circuit (with now Chief Justice Burger as a member of the panel) held:

> "Since in doing these humane acts, he was doing that which a seaman responding to the call of the sea would have done, he was, in a very real sense and in the *Sieracki*-sense, doing the work of a seaman. He can accordingly claim the rights of a vicarious seaman including that of the warranty of seaworthiness." 412 F. 2d at 1022.

The other case is *Nikiforow v. Rittenhouse*, 277 F. Supp. 608 (E. D. Penn. 1967), where, on a motion for partial summary judgment to strike plaintiff's claim based upon the unseaworthiness of defendant's pleasure cruiser, Chief Judge Lord held that the doctrine of unseaworthiness extended to plaintiff, a member of the crew of a Coast Guard cutter who was injured when the samson post of the stranded pleasure cruiser carried away and struck him during an attempt to tow her from a sand bar. Judge Lord's reasoning was as follows:

> "Traditionally, when a vessel became stranded, a crew was not able to abandon its obligation to serve its ship. *The Davidson*, 50 F. 323, 324 (D. Wis. 1880). Quite to the contrary, once a ship ran aground, the officers and crew had a duty to attempt everything within their means to free the vessel, whether by attempting to tow the ship free by manning the long boats, or by carrying out anchors and attempting to pull the vessel off the

> obstruction. *The Ella Hand,* 8 Fed. Cas. No. 4,369, pp. 502, 503 (D. Fla. 1837). Seamen are under a strict duty '• • • to exert themselves to the utmost to save their ship and cargo.' *Bertel v. Panama Transport Co.,* 109 F. Supp. 795, 797 (S.D.N.Y. 1952), aff'd 202 F. 2d 247, 248 (2d Cir. 1953). Under the above precedents, it can be concluded that the plaintiff was performing a service to defendant's vessel, with the defendant's express consent and authorization, that traditionally would have been done by the crew of defendant's vessel, but that under modern division of labor such service is performed by members of the Coast Guard, especially in situations involving pleasure craft in inland waters." 277 F. Supp. at 611.

With due deference, we cannot accept the reasoning of these two cases or believe the Supreme Court, after its "return toward sanity," as Judge Friendly puts it in *Federal Jurisdiction: A General View,* 131 n. 11 (1973) (citing *Usner v. Luckenbach Overseas Corp., supra,* and *Victory Carriers, Inc., v. Law,* 404 U. S. 202 [1971]), would adopt such an extension of the concept of liability without fault.

But assuming the rationale of *Grigsby* and *Nikiforow* correctly forecasts the law in this recondite area, we find that Santini would not be encompassed within their holdings. What act of rescue can be attributed to him? What humane act was Santini doing in responding to the call of the sea? What service was he performing for Klarman's sloop, the Fling? The most we can say is that Santini was a spectator and a victim. He never heard the call of the sea. He never had a chance.

This resolution disposes of all of Santini's claims based on unseaworthiness, including her claim for unlawful death under *Moragne,* which extended the admiralty jurisdiction for such claims within State territorial waters.

However, Santini also has a claim for wrongful death against Klarman based on Klarman's negligence. *Kermarec v. Compagnie Generale Transatlantique,* 358 U. S. 625 (1959). The negligence charged to Klarman is a grapeshot of allegations but very little proof. Principally the claim is that Klarman knew, or should have known, that the winch was improperly secured; that it was the wrong appurtenance or fixture to use as a strong point in a towing-off operation from a sand bar; that the tow rope, being of nylon, was an unsafe and dangerous appliance. We find, however, that Klarman's conduct was not negligent in any respect; that he acted in the manner of a reasonably prudent owner of a sloop that was grounded; that he did not know, or should he have known, that the winch was improperly secured to its pedestal; that, because of his prior use of the same winch for the same purpose and with a line, he reasonably could rely on its security; and that, as a matter of good seamanship, the winch was a proper appliance to use in the circumstances.

We find further that the line used was not nylon, and accept the testimony of Edgar Raymond that it was neither nylon nor dacron and that it was a synthetic product made by the Plymouth Rope Company. That it had a lower breaking strength than nylon or dacron and it would not stretch like nylon. Even if it was nylon it would have been a proper appliance to use for the tow in question.

Klarman alleged, in his third-party complaint on behalf of Santini, a claim against Kellogg for negligence. We have considerable difficulty with this claim because of the fellow servant rule; the Connecticut Workmen's Compensation Act, Conn. Gen. Stat. §§ 31-284 and 293(a); the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq.* But these problems aside, the simple and short answer is that Kellogg was not negligent. We find that his conduct in attempting to free the

Fling was in all respects proper, and that he exercised reasonable care and precaution and good seamanship in doing what he did to relieve the stranded sloop.

Unseaworthiness

The major claims allege that both the Fling and Marine I were unseaworthy. The Fling because her port Merriman winch fastenings were inadequate and her line used as a tow line was unsuitable. The Marine I because her attempted towing was improper and lacking in good seamanship and was guilty of operational negligence which made her unseaworthy.

Five experts gave testimony in this case expressing their opinion on the seamanship of the tow that was employed, on the fitness of the winch that was involved, and on the fitness or appropriateness of the tow rope. They all agreed that the winch did not fail in any respect, but what failed was the winch's fastenings—the screws. We accept this evidence, and find also, by resolving the conflict between the experts, that the use of the winch in an effort to free the Fling was proper and in accordance with good seamanship, and also that the rope was not made of nylon and was a proper and suitable appliance to be used as a tow line. What remains, then, is, did the failure of the winch's fastenings—the six screws—make the Fling unseaworthy?

The winch was mounted on a wooden pedestal with six No. 10, ¾-inch wood screws. It was used primarily for sheeting the genoa sail. The genoa sheet or line led from the clew of the sail to a block on the rail and then horizontally along the deck to the winch. Thus, under normal sailing conditions the stress exerted upon the winch and screws was shear.

The screws which secured the winch to the wood pedestal, the experts agree, were too small in length and in diameter to give sufficient lateral support during the

towing operation. This inadequacy of length and diameter of the screws, in conjunction with the lifting of the winch caused by the fact that the sloop was listing to port at the time of the accident, was the reason the winch tore loose. The above circumstances would cause compression on the outboard edge of the winch and tension on the inboard edge. The fact that the screws remained in the winch, with some slightly bent, indicates that the load was not shear at the moment of the accident.

Thus, we hold that the winch was inadequately fastened, and such inadequacy rendered the sloop unseaworthy. *Mascuilli v. United States*, 387 U. S. 237 (1967); *Crumady v. The J. H. Fisser*, 358 U. S. 423 (1959); *Mahnich v. Southern S. S. Co.*, 321 U. S. 96 (1944); *Usner v. Luckenbach Overseas Corp., supra.*

With regard to Marine I, we find that she was seaworthy in all respects; that Kellogg's actions in his three unsuccessful attempts to take the Fling off the sand bar were in all respects in accordance with good seamanship; that even if he had come aboard the Fling to check on the security of the appurtenances that were used to make the line fast, he would not have discovered any defect; that in applying the force that he did, he was acting within the standards of good seamanship; and that none of his acts amounted to operational negligence, assuming that that can create an unseaworthy condition, which we are satisfied the Supreme Court has not espoused.

Accordingly, the Clerk is directed to enter a decree dismissing all the claims of Rose Santini as Administratrix etc. against the petitioner, Howard Klarman, and third-party defendants, Town of Westport and Frederick Kellogg, Jr.; dismissing all the third-party plaintiff's